No. 81062-1

SANDERS, J. (dissenting)—Although the majority persuasively argues the determination of whether a claimed error in a self-defense instruction is a "manifest error affecting a constitutional right," RAP 2.5(a), must be answered on a case by case basis; I find myself in agreement with the Court of Appeals that this instructional error is indeed a "manifest error affecting a constitutional right" under these particular facts. *State v. O'Hara*, 141 Wn. App. 900, 174 P.3d 114 (2007), *review granted*, 164 Wn.2d 1002, 190 P.3d 55 (2008).

Ryan J. O'Hara was charged with one count of second degree assault because he hit Jeffrey Loree on the head with a "Mag light" flashlight. O'Hara's defense was not that he did not strike Loree as alleged but rather that the use of this force was justified because Loree refused to return Mr. O'Hara's car key and then attempted to open O'Hara's trunk over his protestations. O'Hara relied upon that portion of the self-defense instruction, Instruction No. 11, which says it is lawful to use force in "preventing or attempting to prevent . . . a malicious trespass or other malicious interference with . . . personal property lawfully in that person's possession . . . ." Clerk's Papers (CP) at 35.

As pointed out by the majority, however, the problem arises from the court's

sua sponte[1] instruction 10, which defines malice:

> Malice and maliciously mean an evil intent, wish, or design to vex, annoy or injure another person.

CP at 34.

In the context of this case giving this narrow definition is tantamount to conviction since it was undisputed that Loree retained the key to open O'Hara's trunk so as to return the personal property located therein to Tina Gumm—hardly, by any stretch of the imagination "an evil intent, wish, or design to vex, annoy or injure another person." On the face of it, Mr. Loree was acting as a good Samaritan in aid of a woman in distress. So instructed, the jury would obviously reject self-defense—which it did. "Instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law." *State v. Hutchinson*, 135 Wn.2d 863, 885, 959 P.2d 1061 (1998). That is not the case here.

Although the court also gave instruction 4 (CP at 28), which allows the jury to consider not only direct but circumstantial evidence, that does nothing to mitigate the problem because there was simply no direct or circumstantial evidence of "evil

[1] The majority faults Ryan O'Hara for not objecting to a definitional instruction of which he had no prior notice and no prior opportunity to research. Under these circumstances the alleged error should be reviewed in the interest of justice, even if found not to be a manifest constitutional error as RAP 2.5(a) permits but does not require the Court of Appeals to decline review of an assignment of error.

intent" which the trial court required the jury to find as a prerequisite to acquittal on self-defense grounds.

Malice is a term of art[2] defined by statute in a nuanced manner not commonly understood.

> "Malice" and "maliciously" shall import an evil intent, wish, or design to vex, annoy, or injure another person. *Malice may be inferred from an act done in wilful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a wilful disregard of social duty*.

RCW 9A.04.110(12) (emphasis added).

By giving only the first sentence of the statutory definition in instruction 10, the trial court did more harm to O'Hara's defense than giving no definition at all because it failed to inform the jury that Mr. O'Hara's use of force was lawful if the jury found that (a) Mr. Loree willfully disregarded Mr. O'Hara's right not to have his property invaded and (b) use of the flashlight was a reasonable degree of force to prevent that violation—"evil intent" or not.

A jury instruction that fails to make the law of self-defense "manifestly clear" unconstitutionally denies the defendant a fair trial. *State v. LeFaber*, 128 Wn.2d 896, 898, 913 P.2d 369 (1996). This is because when the facts present a question of self-defense, the State must prove the absence of self-defense beyond a

[2] In contrast to *State v. Scott*, 110 Wn.2d 682, 686, 757 P.2d 492 (1988), which concerned omission of a definition for a common term, "knowledge."

reasonable doubt, just as any other element. *State v. Acosta*, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984).

In a criminal prosecution, the court "'is required to define technical words and expressions, but not words and expressions which are of ordinary understanding and self-explanatory.'" *State v. Lyskoski*, 47 Wn.2d 102, 111, 287 P.2d 114 (1955) (quoting 1 Edward R. Branson & A. H. Reid, The Law of Instructions to Juries § 55, at 169 (3d ed. 1936)). A term is "technical" when the legislature gives it a meaning that differs from common usage. *State v. Brown*, 132 Wn.2d 529, 611, 940 P.2d 546 (1997). But here the trial court gave only this first sentence of the statutory definition, which amounted to the common meaning of the term, rather than the more nuanced complete statutory definition which fit the defendant's theory of the case. *See* Webster's Third New International Dictionary 1367 (1961) (defining "malice" as "intention or desire to harm another usu[ally] seriously through doing something unlawful or otherwise unjustified **:** willfulness in the commission of a wrong **:** evil intention . . . "). Thus the defendant was robbed of the benefit of the self-defense instruction in the situation presented where the victim interferes with the defendant's personal property while *not* motivated by evil intent.

As the majority states, citing *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005):

> To satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case.

Majority at 15. The majority also acknowledges the constitution "'requires the jury be instructed as to each element of the offense charged,'" and "[t]his requirement also applies to a self-defense jury instruction." *Id*. (quoting *State v. Fowler*, 114 Wn.2d 59, 69-70, 785 P.2d 808 (1990)).

The majority essentially justifies its result by claiming that "the failure of the trial court to provide the complete statutory definition of 'malice' was, at most, a failure to further define one of the elements." Majority at 16. Not so. The court gave an incorrect definition of this term of art which was fatal to the defendant and obviously prejudicial. This was "manifest error affecting a constitutional right" as correctly held by the Court of Appeals because the error was truly constitutional and manifest, i.e., it had practical and identifiable consequences in the trial of the case. *State v. Kirkpatrick*, 160 Wn.2d 873, 880, 161 P.3d 990 (2007).

Accordingly I would affirm the Court of Appeals, and I dissent.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR: